

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED APR 29 1943

Joseph W. Starnes

BRIEF AND APPENDIX FOR APPELLEE

**In the United States Court of Appeals for the
District of Columbia**

APRIL TERM 1943

—
No. 8452

78

FLOYD W. LAMORE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

—
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA**

EDWARD M. CURRAN,
United States Attorney,

GEORGE McNEILL,
Assistant United States Attorney,

CHARLES B. MURRAY,
*Assistant United States Attorney,
Attorneys for Appellee.*

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(I)

**In the United States Court of Appeals for the
District of Columbia**

APRIL TERM 1943

No. 8452

FLOYD W. LAMORE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

This appeal is taken from a judgment of sentence of one to four years upon a verdict of grand larceny returned against the appellant on an indictment which charged him with robbery. The property involved was money in the amount of \$150.00. The statement of the case in appellant's brief is correct. Briefly, the complaining witness testified that the defendant agreed to sell automobile tires to him for \$150.00 and at a meeting subsequently arranged for the transaction the defendant, making a gesture indicating that he had a gun and causing the witness to believe he had a gun, forced the latter to hand over \$150.00 to the defendant. The police officer testified that the defendant told him that he did not use a gun and did not pretend to have a gun, but that he did get the complaining witness' money from him by trick. At the trial the defense was alibi. At the conclusion of the evidence the appellant, through his attorney, requested the court to instruct the jury that one of the possible verdicts was grand larceny. The court on such

motion and with the consent of the United States attorney so instructed the jury. The jury returned a verdict of guilty of grand larceny. After the verdict and before sentence the defendant obtained another attorney, his present one, who moved for a new trial on the ground that the instruction which the court had given to the jury at the request of the previous attorney was erroneous. The motion was overruled and sentence imposed and the question now raised is that same and only question.

POINT INVOLVED

On an indictment charging robbery, may a jury return a verdict of larceny?

STATUTE

Title 18, Section 565, U. S. Code:

Verdicts; less offense than charged. In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense.

SUMMARY OF ARGUMENT

The offense of larceny is included in the offense of robbery and therefore an indictment for robbery as a pleading will always support a verdict of larceny.

ARGUMENT

This appellant, represented by competent counsel, urged upon the trial court an instruction which made possible the verdict of which he now complains through another attorney. This circumstance would be urged as decisive of this appeal (compare *Enoch L. Johnson v. United States*, decided by the Supreme Court of the United States on February 15, 1943, and reported in 11 Law Week 4189, 4191), except for the fact that the question raised—that the verdict is not supported by the indictment—if well taken would require a reversal in any event.

The statute quoted in this brief provides that in all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in the offense charged. Is the offense of grand larceny necessarily included in the charge of robbery? The question practically answers itself. Robbery has been referred to as aggravated larceny. If the indictment in the instant case have deleted from it the distinguishing elements which make it robbery, that which remains will be an indictment for grand larceny in almost the precise terms of such indictments in use in this district for many years. Below is an exact copy of the indictment in this case with lines drawn through the words charging the aggravated elements of robbery.

DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Criminal Term

April Term A. D. 1942

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Floyd W. Lamore, on, to wit, the fourteenth day of April 1942, and at the District of Columbia aforesaid, ~~by force and violence, and against resistance, and by putting in fear, and by sudden and stealthy seizure and snatching,~~ feloniously did steal, take and carry away, ~~from and off the person, and from the immediate, actual possession of one Edgar N. Hales,~~ then and there being, one pocketbook, of the value of four dollars, and one hundred and fifty dollars in money, of the value of one hundred and fifty dollars, of the goods, chattels, money and property of the said Edgar N. Hales; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

_____,
*Attorney of the United States
in and for the District of Columbia.*

In the case of *United States v. Copley*, Fed. Cas. No. 14892, 25 Fed. Cas. 701, 4 Cranch C. C. (Dist. Col.) 517 (1835), it was held that an indictment for assault with intent to kill would support a verdict of simple assault.

In the case of *United States v. Dixon*, Fed. Cas. No. 14968, 25 Fed. Cas. 872, 1 Cranch C. C. 414 (1807), it was held that an indictment for burglary would support a verdict of simple larceny.

In the case of *United States v. Read*, Fed. Cas. No. 16126, 27 Fed. Cas. 716, 2 Cranch C. C. 198 (1820), it was held that an indictment for breaking into a storehouse and stealing therefrom would support a verdict of larceny only.

In the case of *Owens v. United States*, 61 App. D. C. 132, 58 F. (2d) 684 (1932), it was held that a count in an indictment charging the defendant with murder in the first degree in that he killed while perpetrating a felony would support a verdict for the lesser offense of murder in the second degree.

CONCLUSION

It is respectfully submitted that the verdict in this case was supported by the pleading, and the resulting judgment ought to be affirmed.

Respectfully submitted.

EDWARD M. CURRAN,

United States Attorney,

CHARLES B. MURRAY,

Assistant United States Attorney,

Attorneys for Appellee.

APPENDIX

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[1] DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT
OF COLUMBIA

Holding a Criminal Term

April Term A. D. 1942

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_____,
*Attorney of the United States
in and for the District of Columbia.*

[5] Filed Nov. 28, 1942. Charles E. Stewart, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Criminal No. 69764

UNITED STATES

v.

FLOYD W. LAMORE

MOTION FOR NEW TRIAL

Now comes the defendant through his counsel and moves the court to set aside the verdict and grant a new trial based on the following reasons:

1. The verdict was contrary to the evidence.
2. The verdict was not authorized by law.
3. The court erred in its instructions to the jury.
4. And for other reasons apparent of record.

(s) JAMES J. LAUGHLIN,
James J. Laughlin,
National Press Bldg.,
Counsel for defendant.

I certify that I have this day mailed copy of this motion to Honorable George E. McNeil, Assistant U. S. Attorney.

(s) JAMES J. LAUGHLIN.
James J. Laughlin.

This the 28th day of November 1942.

[6] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

Holding a Criminal Court

Criminal No. 69764

UNITED STATES

v.

FLOYD W. LAMORE

Filed Jan. 5, 1943. Charles E. Stewart, Clerk.

MEMORANDUM OVERRULING MOTION FOR A NEW TRIAL

This case was submitted for consideration on a motion for a new trial following defendant's conviction of the crime of

grand larceny. The sole point urged is that the Court erred in instructing the jury that a verdict of grand larceny might be returned on the indictment, which charged robbery. The instruction as to grand larceny was given by the Court at the specific request of defendant's counsel made after conclusion of a charge submitting the case of robbery. The United States Attorney consented. There was no dispute in the testimony that a billfold containing One Hundred Fifty Dollars had been wrongfully taken from the complaining witness. While the defendant maintained he was not the party involved in the crime, and called witnesses to support an alibi, nevertheless there was testimony that when arrested that defendant admitted wrongfully taking the billfold with One Hundred Fifty Dollars in it from complainant, saying he had "conned" the complaining witness out of the money, but denied use of a pistol. On cross-examination defendant's counsel questioned complainant at some length as to whether the party who had obtained the billfold and money had used a pistol. From the circumstances related it is apparent that when the defendant requested an instruction as to grand larceny, he expected to gain a benefit from it. If it was an error to give the charge it [7] was an error which the defendant led the Court to commit and he cannot be heard to complain. *Dowling v. United States*, 41 App. D. C. 11 (see page 18). It would be strange procedure which would permit a defendant to have his case submitted on a theory suggested by him and when that theory is adopted, claim another trial on a different theory. Under the circumstances, he would accomplish two trials on the question of his guilt or innocence of the wrong charged.

Because of the views expressed, it does not seem necessary to give extensive consideration to the question whether the conviction of grand larceny may be sustained upon an indictment charging robbery. However, it is noted the indictment for robbery filed against the defendant contains all of the essential elements of the crime of grand larceny. The charge as made was that the defendant "by force and violence, and against resistance, and by putting in fear, * * * feloniously did steal, take and carry away, from and off the person, and from the immediate, actual possession of one Edgar N.

Hales, * * * one pocketbook, of the value of four dollars, and one hundred and fifty dollars in money, of the value of one hundred and fifty dollars, of the goods, chattels, money and property of the said Edgar N. Hales." If there is eliminated from the charge the element of force and violence, a case of grand larceny is clearly charged. The decision of the question raised by the defendant does not depend upon the test whether grand larceny is a lesser or greater offense than robbery, but upon determining whether the defendant was fairly advised by the indictment of a charge of grand larceny as well as robbery and whether his conviction of grand larceny would make it possible for defendant to plead former jeopardy at another trial. The indictment in this case meets both of these tests. Thus the charge of the Court appears in the case at bar to have been correct. Some support to the position here taken is given by a Kentucky case cited by defendant, namely, *Southerland v. Commonwealth*, 288 S. W. 1051.

For the reasons stated, the motion for a new trial will be overruled.

(s) BOLITHA J. LAWS, *Justice*.

JANUARY 5, 1943.

[8] DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

UNITED STATES

v.

LAMORE

No. 69764

Tuesday, February 2, 1943, the court resumes its session pursuant to adjournment; Mr. Justice Laws Presiding.

Come as will the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by his attorney, James J. Laughlin, Esq.; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said;

Whereupon, it is considered by the court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) year to four (4) years, thereupon term is continued to March 31, 1943.

[11] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Criminal No. 69764

UNITED STATES

v.

FLOYD W. LAMORE

BILL OF EXCEPTIONS

Be it remembered that the above entitled cause came on for trial on the 23rd day of November 1942, and was concluded on the 24th day of November 1942.

Edgar N. Hales, called as a witness for the United States, testified under oath that shortly before April 14, 1942, he arranged through a friend employed at the Navy Yard to communicate by telephone with the defendant and held several telephone conversations with the defendant, in which it was agreed that for the sum of \$150 witness would purchase certain automobile tires from the defendant. A meeting was arranged at 13th and K Streets NW., in the District of Columbia, for April 14, 1942, at 8 P. M. Shortly before that time on April 14, 1942, witness above drove in his automobile to the corner of 13th and K Streets, looking for a service station automobile because it was in such an automobile he expected to see the defendant. While he was driving his car slowly near the intersection, looking for the defendant, the defendant, whom witness had never actually seen, jumped into witness' automobile and with his hand in his coat pocket, raised his hand in a gesture which made witness believe he had a gun inside his coat pocket, and commanded witness to drive into a nearby alley located in the District of Columbia. Witness

drove his car there and at that point the defendant said, "Give me that money." Witness asked defendant what money he referred to and defendant said, "That \$150.00 you've got." Witness handed his money in the amount of \$150.00 to the defendant.

[12] Robert J. Morgan, called as a witness for the United States, testified under oath that he arrested the defendant and at the police precinct station questioned the defendant about the alleged robbery of \$150.00 from Edgar N. Hales. The defendant stated that he did not have a gun or pretend to have a gun and did not rob Edgar N. Hales, but had obtained his money from him by trick.

The defendant offered substantial evidence tending to show that he was not at the place where the alleged robbery occurred at the time thereof.

At the conclusion of the evidence the defendant, through his attorney, requested the Court to instruct the jury that one of the possible verdicts was grand larceny. Upon consent of the District Attorney, this motion was granted and the Court instructed the jury to the effect that they might return a verdict of guilty of robbery, guilty of grand larceny, or of not guilty. The jury deliberated on the case and returned a verdict of guilty of grand larceny.

For the reason that the foregoing matters are not of record, the defendant moves that they be made of record so that he may pursue his appeal to the United States Court of Appeals for the District of Columbia, which is done; and the defendant presents this his bill of exceptions and requests that the same be signed, which is done this 31st day of March 1943.

By the Court:

(S.) BOLITHA J. LAWS, *Justice*.

I consent to the settling and signing of this bill of exceptions:

CHARLES B. MURRAY,

Charles B. Murray,

Assistant United States Attorney.

